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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a habeas petitioner and the court below received fair notice of the entity seeking to appeal the granting of the writ when counsel for the State filed a notice of appeal with a caption which specifically designated one of the three individual respondents who were sued in their official capacities, but included an "et al." designation of the others, and the body of the notice stated that "respondents" appeal from an order granting the writ?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
THE DECISION BELOW, RAISING AN ISSUE UPON WHICH THE CIRCUITS ARE IN CONFLICT, UNNECESSARILY DENIED THE STATE ITS RIGHT TO APPEAL THE GRANTING OF A WRIT OF HABEAS CORPUS, THEREBY OFFENDING PRINCIPLES OF FEDERALISM AND COMITY	6
CONCLUSION	12

APPENDIX

Order of the United States Court of Appeals for the Seventh Circuit, dismissing the appeal for lack of jurisdiction, dated September 20, 1991 . 1a

Order of the United States District Court for the Northern District of Illinois, Eastern Division, dated May 10, 1990 ..... 5a

Notice of Appeal filed in the United States District Court for Northern Illinois, Eastern Division, dated June 7, 1990 ..... 7a

Order of the United States Court of Appeals for the Seventh Circuit, dated June 14, 1990, advising that notice of appeal may be deficient under Fed.R.App.P. 3(c) 9a

Order of the United States Court of Appeals for the Seventh Circuit, dated December 18, 1990, ordering parties to proceed with briefing on the merits 11a

Battle v. Anderson, decision of the United States Court of Appeals for the Tenth Circuit, 1991 U.S. App. Lexis 26084 ..... 13a

TABLE OF AUTHORITIES

Cases	PAGE
Appeal of District of Columbia Nurses' Ass'n, 854 F.2d 1448 (D.C. Cir. 1988), *cert. denied*, 491 U.S. 906 (1989)	11
Association of American Medical Colleges v. Cuomo, 913 F.2d 55 (2nd Cir. 1990), *cert. denied*, 112 S.Ct. 184 (1991)	10
Battle v. Anderson, 1991 U.S. App. Lexis 26084	10
Biros v. Spaulding-Evenflo Co., Inc., 934 F.2d 740 (6th Cir. 1991)	7
Ford v. Nicks, 866 F.2d 865 (6th Cir. 1989)	10
Graddick v. Newman, 453 U.S. 928, 102 S.Ct. 4 (1981)	8
Granberry v. Greer, 481 U.S. 129, 107 S.Ct. 1671 (1987)	9
Karcher v. May, 484 U.S. 72, 108 S.Ct. 388 (1987)	9
Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099 (1985)	8
Laidley v. McClain, 914 F.2d 1386 (10th Cir. 1990)	7
Mariani-Giron v. Acevedo-Ruiz, 877 F.2d 1114 (1st Cir. 1989)	7
Marin-Piazza v. Aponte-Rogue, 873 F.2d 432 (1st Cir. 1989)	10, 11
Masquerade Novelty v. Unique Industries, 912 F.2d 663 (3rd Cir. 1990)	7

McClesky v. Zant, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) 11

Minority Employees v. Tenn. Dept. of Emp. Sec., 901 F.2d 1327 (6th Cir. 1990) (en banc), *cert. denied, Davis v. Tenn. Dept. of Emp. Sec.*, 111 S.Ct. 210 (1990) 7, 9, 10

Morales v. Pan American Life Ins. Co., 914 F.2d 83 (5th Cir. 1990) 10

National Center for Immigrants' Rights, Inc. v. Immigration & Naturalization Service, 892 F.2d 814 (9th Cir. 1989) 7, 9

Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2408 (1988) ..... *passim*

United States v. Schneider, 926 F.2d 777 (8th Cir. 1991) 10

Worlds v. Dept. of Health & Rehab. Service, 929 F.2d 591 (11th Cir. 1991) 10

Statutory Provision

Federal Rule of Appellate Procedure 3(c) ..... *passim*

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GARY JOHNSON, STATE'S ATTORNEY OF KANE COUNTY; JOHN RANDALL, SHERIFF OF KANE COUNTY; ROLAND W. BURRIS, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioners,

vs.

CHI FENG SU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, Gary Johnson, John Randall, and Roland W. Burris, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on September 20, 1991.

OPINION BELOW

The order of the United States Court of Appeals for the Seventh Circuit is not reported. It is reproduced in the appendix hereto, p. 1a, *infra*. The opinion of the

United States District Court for the Northern District of Illinois, Eastern Division, is reported at 737 F.Supp. 488 (N.D. Ill. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 20, 1991, dismissing the appeal for lack of jurisdiction. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petition for writ of certiorari is timely filed pursuant to 28 U.S.C. § 2102(c).

STATUTE INVOLVED

Federal Rule of Appellate Procedure 3(c)

Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

In Kane County, Illinois, respondent, Dr. Chi Feng Su, [hereinafter "Su"], was charged in a single indictment with fifty-five counts of unlawful delivery of a controlled substance. After Su's attorney indicated that he planned to file a motion for severance (R. 40), the State filed an election indicating that it would try Su only on Counts 41-55, but use evidence of the remaining counts as relevant to motive, intent, method of operation and common scheme. (C. 58) It appears from the record that Su, through his attorney, agreed to the use of the evidence of Counts 1-40 in this manner. (R. 118-19)

After a bench trial, Su was found not guilty of the fifteen counts on which he was tried. (R. 1451) The trial judge, the Honorable John Nickels, stated that he was not convinced beyond a reasonable doubt that Su knowingly and unlawfully issued the prescriptions described in those counts outside the regular course of professional treatment. (R. 1450-51)

Approximately one week later, the State filed a motion for substitution of judges for trial on the remaining forty counts. (C. 63) On the same date, Su filed a motion to dismiss the remaining forty counts on the basis of collateral estoppel and double jeopardy. Both the State's motion to substitute judges and the respondent's motion to dismiss the remaining charges were denied. (C. 70; 126) The State later filed a motion for recusal before Judge Nickels which was also denied. (C. 82)

Su appealed the denial of his motion to dismiss to the Illinois Appellate Court, Second District, which affirmed on March 30, 1989. Su then filed a petition for leave to

appeal to the Illinois Supreme Court which was denied on October 5, 1989.

On June 5, 1989, Su filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division, naming as respondents the State's Attorney of Kane County, the Sheriff of Kane County, and the Illinois Attorney General.[1] On May 10, 1990, the Honorable James H. Alesia, determining that "[t]he State could not have a 'completely blank slate' for a second trial," granted the writ. *U.S. ex rel. Su v. Casey*, 737 F.Supp. 488, 493 (N.D. Ill. 1990). In an order entered the same day, Judge Alesia ordered that the Sheriff of Kane County shall be permanently enjoined from restricting Su's freedom, and the State's Attorney of Kane County and the Illinois Attorney General shall be permanently enjoined from prosecuting Su on any charges brought against him as part of the case, *People v. Su*, Case No. 86 CF 981 in Kane County, Illinois. Said order is reproduced in the appendix hereto, p. 5a, *infra*.

On June 7, 1990,[2] the State filed a notice of appeal which is reproduced in the appendix hereto, p. 7a, *infra*. The caption of the notice of appeal specifically named Robert F. Casey as an appellant, but included an "et al." designation of the other two. The body of the notice

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[1] Although the petition named Robert F. Casey as the State's Attorney of Kane County, Gary Johnson succeeded Casey as State's Attorney in December of 1988. The petition also named Neil F. Hartigan as Illinois Attorney General. Hartigan was later succeeded by Roland W. Burris in January of 1990. John Randall, who was named in the petition as the Sheriff of Kane County, still holds that office.

[2] Pursuant to Federal Rule of Appellate Procedure 26(a), the State's notice of appeal was not required to be filed until June 11, 1990.

stated that "respondents" appeal from an order granting the writ. The clerk of the District Court accepted the notice of appeal.

On June 14, 1990, the United States Court of Appeals for the Seventh Circuit notified counsel for the State that its notice of appeal may be deficient under Federal Rule of Appellate Procedure 3(c) for failing to specifically name the parties taking the appeal in the body of the notice. The court's order, which is reproduced in the appendix hereto, p. 9a, *infra*, ordered the State to file a jurisdictional memorandum stating why the appeal should not be dismissed for lack of jurisdiction. Counsel for the State complied and Su's attorney responded.

On June 28, 1990, pursuant to Federal Rule of Appellate Procedure 4(a)(5), counsel for the State filed a Motion to Extend Time for Filing Notice of Appeal, seeking additional time in which to file another notice of appeal. The motion explained to the District Court how the Court of Appeals had notified counsel for the State that its notice of appeal may be deficient. It also stated that the Seventh Circuit's construction of Fed.R.App.P. 3(c) would probably result in a dismissal of the entire appeal. The District Court nonetheless denied the State's motion.

On December 18, 1990, the Court of Appeals ordered the parties to proceed with briefing on the merits and to address the issue of appellate jurisdiction again in their briefs.[3] Said order is reproduced in the appendix hereto, p. 11a, *infra*.

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[3] In the Court of Appeals, the State also argued that since a recent decision of that court, decided in July of 1990, it appeared that of the three respondents Su named in his petition, none was

(Footnote continued on following page)

Approximately two weeks after hearing oral arguments, the Court of Appeals dismissed the State's appeal for lack of jurisdiction pursuant to Fed.R.App.P. 3(c).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, RAISING AN ISSUE UPON WHICH THE CIRCUITS ARE IN CONFLICT, UNNECESSARILY DENIED THE STATE ITS RIGHT TO APPEAL THE GRANTING OF A WRIT OF HABEAS CORPUS, THEREBY OFFENDING PRINCIPLES OF FEDERALISM AND COMITY.

The court below dismissed the State's entire appeal because none of the respondents were individually named in the body of the notice of appeal, even though the caption expressly named Robert F. Casey, the former State's Attorney of Kane County who Su named in his habeas petition, as an appellant. The ruling is in conflict with the decisions of the United States courts of appeals for other

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[3] *continued*
technically his custodian possessing the power to comply with the writ. *See Cruz v. Warden*, 907 F.2d 665 n.1 (7th Cir. 1990) (holding that the state attorney general is not a proper respondent when a petitioner is out on bail which, for purposes of Rule 2, 28 U.S.C.A. foll. § 2254, constitutes present custody). Before *Cruz*, it appeared that a person out on bail could name the state attorney general as a respondent. *See* Rule 2, 28 U.S.C.A. foll. § 2254 advisory committee's notes. Citing *Mullaney v. Anderson*, 342 U.S. 415, 415-17 (1952) and Federal Rule of Civil Procedure 21, the State argued that if in fact no proper respondent was named, the Court of Appeals need simply add Su's true custodian—presumably the Circuit Court of the 16th Judicial Circuit which admitted him to bail—if it decided the granting of the writ was in fact warranted. The Court of Appeals failed to address this question.

circuits that have considered the question of whether jurisdiction exists as to a party specifically named in the caption, but generically referred to in the body of a notice of appeal.[4] The ruling also fails to honor this Court's settled rule that "the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on the merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316, 108 S.Ct. 2405, 2408 (1988), citing *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962).

Petitioners note that *Torres*, the case upon which the court below relied, involved a situation in which, because of a clerical error in the notice of appeal, one putative appellant was not specified as a party to the appeal in any way. He was not specified by name in either the caption or the body of the notice. Nor was he specified by reference or implication. In fact, of the 16 intervening plaintiffs, he was the only one not specified by name as an appellant in the body of the notice. Accordingly, this Court found that he had not filed the "functional equivalent of a notice of appeal." 487 U.S. at 317. Here, at the very least, the court below had jurisdiction over the appeal of the State's Attorney of Kane County, who was sued in his official capacity and whose predecessor was

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[4] *See Biros v. Spaulding-Evenflo Co., Inc.*, 934 F.2d 740, 742 (6th Cir. 1991); *Mariani-Giron v. Acevedo-Ruiz*, 877 F.2d 1114, 1116 (1st Cir. 1989); *National Center for Immigrants' Rights, Inc. v. Immigration & Naturalization Service*, 892 F.2d 814, 816 n.2 (9th Cir. 1989); *Laidley v. McClain*, 914 F.2d 1386, 1388-89 (10th Cir. 1990); *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d 1327, 1335 (6th Cir. 1990) (en banc), *cert. denied, Davis v. Tenn. Dept. of Emp. Sec.*, 111 S.Ct. 210 (1990). In *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 666 n.1 (3rd Cir. 1990), the Third Circuit, after expressly noting a conflict in the circuits regarding the question, declined to resolve the issue.

specifically named in the caption of the notice of appeal.[5] *See Graddick v. Newman*, 453 U.S. 928, 940-41, 102 S.Ct. 4 (1981) (Rehnquist, J.; mem.) (state attorney general lost nothing by his failure to request a formal substitution of parties following his replacement).

It is in fact the petitioners' position that they each filed the "functional equivalent of a notice of appeal." All were named as appellants by implication. Specifically, they were all named as appellants by reference to their position as "respondents" in the body of the notice of appeal. The caption of the habeas petition filed by Su in the District Court designated as respondents the State's Attorney of Kane County, the Sheriff of Kane County, and the Illinois Attorney General. Although succeeding individual officeholders were automatically substituted for their predecessors, (*see* Fed.R.Civ.P. 25(d); Fed.R.App.P. 43(c)), no respondents were dismissed nor added at any stage of the proceedings. The caption also included a case number—No. 89 C 4516. The case number was used in all subsequent filings, including the notice of appeal. When petitioners herein referred to themselves in the body of the notice of appeal as "respondents," they could only have been referring to the respondents in Case No. 89 C 4516. Unlike in *Torres*, there was no list of appellants from which one name was omitted. The Assistant Attorney General who filed the notice of appeal intended the notice

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[5] Jurisdiction over an appeal filed only by the State's Attorney of Kane County, who was sued in his capacity as a state official, would have been sufficient for purposes of allowing the Court of Appeals to review the granting of the writ. *See Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.")

to specify as the parties taking the appeal the "respondents" in Case No. 89 C 4516 and those are precisely the parties the notice did specify as appellants.

Furthermore, specifically in a Section 2254 case which is an official-capacity action, it is clear who would be seeking to appeal the granting of the writ. Su's attorney and the court below clearly understood that an appeal by Robert F. Casey, who Su named in his official capacity as the State's Attorney of Kane County, was in effect an appeal by the State of Illinois. Indeed, this Court has repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder. *Karcher v. May*, 484 U.S. 72, 78, 108 S.Ct. 388 (1987). This Court also routinely refers to the responding party or parties in Section 2254 cases as "the State." *See e.g., Granberry v. Greer*, 481 U.S. 129, 134, 107 S.Ct. 1671 (1987) (providing that "[w]hen the State answers a habeas corpus petition, it has a duty to advise the district court whether the prisoner has, in fact, exhausted all available state remedies.").

Application of these principles compels the conclusion that many litigants, not only in habeas cases but in a vast variety of cases, are being denied their right to appeal on the basis of "mere technicalities." Even after *Torres*, "it is evident that the bench and bar continue to be plagued by confusion in the interpretation of the language of Fed.R.App.P. 3(c)." *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d at 1335 n.4.[6] "Unless and until

[6] *See National Center for Immigrants' Rights, Inc. v. Immigration & Naturalization Service*, 892 F.2d 814, 815-17 (9th Cir. 1989) (holding that individual names of appealing parties need not be listed in body of notice in instances in which generic term, such

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[6] *continued*

as "plaintiffs" or "defendants," adequately identified them); *Association of American Medical Colleges v. Cuomo*, 913 F.2d 55, 56 (2nd Cir. 1990), *cert. denied*, 112 S.Ct. 184 (1991) (holding that the phrase "the defendants in the above matter hereby appeal" was the functional equivalent of naming each and every defendant); *United States v. Schneider*, 926 F.2d 777, 778-79 (8th Cir. 1991) (holding that an "et al." designation in a notice of appeal is ineffectual to bring before the court any defendant other than the named appellant); *Worlds v. Dept. of Health & Rehab. Service*, 929 F.2d 591, 593 (11th Cir. 1991) (holding that the use of the term "et al.," was not sufficient to indicate that all putative appellants were appealing); *Morales v. Pan American Life Ins. Co.*, 914 F.2d 84, 85 (5th Cir. 1990) (The Fifth Circuit recognizes four situations where the "et al." designation will satisfy the Rule 3(c) specificity requirement); *Battle v. Anderson*, 1991 U.S. App. Lexis 26084 (appendix, p. 13a, *infra*) (Tenth Circuit recognizes official capacity suits as an exception to the general rule in *Torres*). A panel of the Sixth Circuit Court of Appeals held in *Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989), that although the caption of the notice of appeal specifically named only one defendant and referred to the others as "et al.," the specificity requirement was met where the body stated that the appeal was being taken by "the defendants," indicating that all the defendants were appealing, not just some of them. The following year, on rehearing en banc, the court held in *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d at 1332, that the use of "et al." to designate certain appellants in the caption of a notice of appeal precludes conferment of jurisdiction over the appeal of those plaintiffs even though designated generically as "plaintiffs" in the body. However, Judge Nelson, joined by Judges Jones, Norris, and Chief Judge Merritt, filed a separate opinion, concurring in part and dissenting in part, which stated that the notice of appeal filed in the case was "completely faithful to the plain commands of Rule 3(c)." 901 F.2d at 1341. Judge Martin, joined by Judge Jones, filed a dissenting opinion also disagreeing with the reasoning of the majority. Finally, Judge Guy filed a concurring opinion, stating that although he believed the dissent set forth a more reasonable approach to the interpretation of Fed.R.App.P. 3(c), he joined the conclusion reached by the majority for the compelling reason that if he instead dissented, it would result in an equally divided court and no opinion would issue from the en banc court. 901 F.2d at 1340. Disagreement also exists among the judges of the First Circuit. *See Marin-Piazza v. Aponte-Rogue*, 873 F.2d 432 (1st Cir. 1989), where Judge Coffin,

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Congress or [this Court] decrees otherwise," United States courts of appeals will continue to deny litigants their right to appeal. *Appeal of District of Columbia Nurses' Ass'n*, 854 F.2d 1448, 1451 (D.C. Cir. 1988) (Mikva, J., concurring), *cert. denied*, 491 U.S. 906 (1989). This will be true even though such litigants afford their opponents and the courts of appeals fair notice of their intent to appeal.

This Court has recognized that reexamination of state convictions on federal habeas offends federalism and comity. *McClesky v. Zant*, 111 S.Ct. 1454, 1469, 113 L.Ed.2d 517 (1991). The offense compounds when, as in the instant case, the State is denied its right to appeal the granting of the writ on the basis of "mere technicalities." The decision below affords this Court the opportunity both to correct error which has frustrated a State's sovereign power to punish offenders of its criminal laws, and to resolve a conflict among the circuits on an issue having widespread implications in the area of federal appellate procedure.

[6] *continued*

who wrote the court's opinion, noted that he disagreed with his brethren on the question of whether a notice of appeal stating that "the codefendants in this action hereby appeal" was effective as to all codefendants. "This refers to a precise group of five persons," Judge Coffin said. "In my view," he continued, "this is sufficient to meet the holding in *Torres*. . . ." 873 F.2d at 433 n.1.

CONCLUSION

For all the reasons discussed herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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